89- 1407

No.

In The

Supreme Court of the United States

October Term, 1989

MISTY DAWN DAVIS, an infant
under eighteen years of age,
by and through her Guardian,
Farmers Bank & Capital Trust
Company of Frankfort, Kentucky,

Petitioner,

v.

KENTUCKY FINANCE COMPANIES RETIREMENT PLAN; KENTUCKY FINANCE COMPANIES RETIREMENT PLAN RETIREMENT COMMITTEE; KENTUCKY FINANCE COMPANY, INC.;
and
CENTRAL BANK & TRUST COMPANY

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE 6TH CIRCUIT

WILLIAM R. MEREDITH
Attorney for the Petitioner
Misty Dawn Davis, an infant under eighteen (18) years of age, by and through her Guardian, FARMERS BANK & CAPITAL TRUST COMPANY of Frankfort, Kentucky
109 Short Street
Harrodsburg, Kentucky 40330
(606) 734-5119

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

63pp

QUESTIONS PRESENTED FOR REVIEW

I. In view of the substantial conflict among all the circuits, does the ERISA deferential standard of review where the Trustees exercise discretionary power to determine eligibility for benefits or to construe terms of a plan involve only a simple determination of whether the fiduciary's decision was "arbitrary or capricious" in the mind of the factfinder or, if not, does the standard of review include a further judicial determination that the Trustee's decision was in "bad faith" or, if not, whether the decision was supported by "substantial evidence" or was contrary to law.

II. What is the "standard of review" in ERISA claims where the trustees/fiduciaries lack neutrality, impartiality and loyalty to plan participants and beneficiaries constituting more than a mere "conflict of interest".

III. Must a federal court, reviewing a trustee's decision to deny death benefits to a beneficiary of an ERISA plan because the participant was not an employee at the time of his death, recognize the decision of a state court of last resort which decided the participant was an employee.

IV. To what extent does a fiduciary's mishandling of a claim constitute an actionable breach of the fiduciary duties set forth in the Employee Retirement Security Act of 1974, § 404(a) and what is the nature and extent of the "appropriate equitable relief" to redress such violations under § 502(a)(3).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

No.

In The

Supreme Court of the United States

October Term, 1989

MISTY DAWN DAVIS, an infant
under eighteen years of age,
by and through her Guardian,
Farmers Bank & Capital Trust
Company of Frankfort, Kentucky,

Petitioner,

v.

KENTUCKY FINANCE COMPANIES RETIREMENT
PLAN; KENTUCKY FINANCE COMPANIES
RETIREMENT PLAN RETIREMENT COMMITTEE;
KENTUCKY FINANCE COMPANY, INC.;
and
CENTRAL BANK & TRUST COMPANY

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE 6TH CIRCUIT

The Petitioner, Misty Dawn Davis, an infant under eighteen years of age, by and through her Guardian, Farmers Bank & Capital Trust Company, Frankfort, Kentucky, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on October 12, 1989. A Petition for Rehearing was denied by

the Court and the Order was entered on December 4, 1989.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 887 F.2d 689 (6th Cir. 1989) and appears in the Appendix at 3 to 19. The Orders of the United States District Court for the Eastern District of Kentucky – Lexington are not reported. There the Court denied the Petitioner's motion to amend the Complaint to make the individual trustees defendants and the Court granted the Respondents' motion for summary judgment thereby giving deference to the trustees decision denying Petitioner's claim for death benefits. The Court also denied the Petitioner's motion to recognize as dispositive the Kentucky Supreme Court's decision in *Woodson v. Manhattan Life Insurance Company of New York*, 743 S.W.2d 835 (Ky. 1987). In this related case, the Kentucky Supreme Court affirmed a jury's verdict that the Petitioner's father was an employee at the time of his death. The *Woodson* case appears in the Appendix at 20 to 29.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on October 12, 1989. A timely petition for rehearing was denied by the Court of Appeals and entered on December 4, 1989. The Order appears in the Appendix at 1 and 2. The jurisdiction of this Honorable

Court is respectfully invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U.S.C. 1001 *et seq.*

Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, 877, Sec. 404(a), as amended, 29 U.S.C. 1104(a).

Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, 891, Sec. 502(a)(3), as amended, 29 U.S.C. 1132(a)(3).

STATEMENT OF THE CASE

This ERISA dispute arose because of the death of Kenneth C. Davis, (here-in-after "Davis"), a lawyer, who was an officer, director, lobbyist and general counsel for Kentucky Finance Company, Inc. (here-in-after "KFC"). Davis was employed by KFC in 1960 and he was a vested member of the company's retirement plan with 23 years of credited service in 1982. The Plan is a unilateral, funded plan.

A meeting between the Board of Directors and Davis occurred on February 8, 1982. No documentation by Board or Plan minutes or KFC memorandum exist of the substance of the meeting but, following the meeting, Davis formally resigned as an officer and director. The

resignation was silent on whether he had also resigned as an employee. Subsequently, for a nominal sum, Davis was given his expensive office furniture and the new company car he was driving and he was to continue to receive his monthly pay through August 8, 1982, a period of six (6) months from the date of the meeting when he would be 59½ years old, a point where he would gain certain income tax advantages for a lump sum payment of his retirement benefits. Mr. Davis continued to be covered by free group health insurance and a free $25,000 life insurance policy (collected following his death) as well as continuing to participate in the employee thrift plan and a stock purchase plan.

Davis was killed by his wife on May 19, 1982. The Petitioner, as the only dependent child of Davis, is entitled to substantial death benefits under the Plan if her father was an employee at the time of his death on a terminable leave of absence. The Plan has a provision for a leave of absence. The Respondents *post hoc* claim Davis was terminated as an employee on February 8, 1982 and, therefore, under the provisions of the Plan, his dependent child is not entitled to death benefits. The pay continuation, in their view, was "severance pay". The company did not have an employee severance plan.

The Board of Directors of KFC composed the Committee of Trustees administering the Plan. The decision that Davis was "terminated" as of February 8, 1982 was made *after* Davis' death when the Board consisted of seven (7) members. Of the seven (7), two (2) were management level officers and the other five (5) included the Chairman of the Board of Kentucky Central Life Insurance Company, (which the Respondents admit under 6th

Cir. R. 25 has a financial interest in the outcome of this case), three (3) senior partners in the law firm then known as Kincaid, Wilson, Schaeffer & Hembree, two (2) of whom along with the remaining Board member were trustees of trusts which own 83% of Kentucky Central Life Insurance Company (which, in turn, through a subsidiary, owns 100% of KFC). These were the gentlemen who made the decision Davis was not granted a terminable leave of absence but was "terminated" under the plan. Four of them also testified for the Defendants in *Woodson*, infra.

In a related matter, Davis' executor filed a civil action in the Kentucky state court to collect the proceeds of a life insurance policy. The issue was whether Davis was an employee at the time of his death. The Court instructed the jury:

> "Do you believe from the evidence that the decedent, Kenneth C. Davis, at the time of his death was on a leave of absence granted to him as an employee of Kentucky Finance which was approved by the Executive Committee?"

The jury was out only 20 minutes before returning a verdict that Davis was an employee at the time of his death. This finding was affirmed on appeal to the Kentucky Supreme Court. *Woodson v. Manhattan Life Insurance Company of New York*, 743 S.W.2d 835 (Ky. 1987). App. 20 to 29. In this case, KFC was a Defendant by cross-complaint of the insurance company who claimed indemnity in the event Manhattan had to pay the $1,000,000 death proceeds which it would not have had to do if Davis was

not an employee. Regardless of the jury verdict, the Trustees maintained their position that Davis was not an employee at the time of his death. The District Court and the Sixth Circuit rejected affirmation of the jury verdict by the Kentucky Supreme Court on collateral estoppel principles.

The Petitioner filed a complaint in the U.S. District Court of Kentucky, Eastern Division at Lexington, which had ERISA jurisdiction under 29 U.S.C. 1001 *et seq*. The District Court in an unpublished decision said:

> "In summary, as previously pointed out, so long as the Court is satisfied that the decision of the Retirement Committee was not arbitrary or capricious, this court has no authority to modify, reopen or reverse the Retirement Committee's decision."

The 6th Circuit affirmed even though the only evidence to support the Trustee's decision was an Affidavit of their Attorney, Board member and Trustee, Edwin F. Schaeffer, Jr. App. 32 to 35. Mr. Schaeffer was one of the trustees of the trusts which controlled Custody Central Life Insurance Company. Contrary to the opinion of the Sixth Circuit (App. at 14), this is the only evidence in the record below on which the courts based their decision to give deference to the decision of the Plan Trustees. The Court further found the Plan contained language giving discretion to the Trustees to interpret the term "employee". *Davis v. Kentucky Finance Companies Retirement Plan et al*, 887 F.2d 689 (6th Cir. 1989).

The Court said:

> " . . . the District Court was correct in applying the "arbitrary and capricious" standard to the

> Committee's interpretation and application of the term "employee" in the KFC plan. The fact that the Retirement Committee that administers the plan is composed of management-level employees of KFC is significant only to the extent that any possible conflict of interest should be taken into account as a factor in determining whether the Committee's decision was arbitrary and capricious." Id. 694

The 6th Circuit cited *Firestone,* infra, but neither the District Court or the Appellate Court addressed "conflict of interest" as a factor or loyalty as an issue when ruling that the trustee's decision would not be disturbed on "arbitrary and capricious" principles as there was no "strong" reason to do so.

In addition, the Court said:

> " . . . Further, she claims that he was receiving a salary, and not severance pay, during the six months after his departure from KFC. Under the arbitrary and capricious standard and under the standard of review of summary judgments, there is no *strong* basis for overturning the Committee's determination."

Id. 694 (emphasis added)

ARGUMENT

FOR GRANTING THE WRIT

I

There exist a substantial conflict among the circuits as to the substance and the application of the deferential "arbitrary or capricious" standard of review for decisions of ERISA fiduciaries with discretionary authority to determine eligibility and interpret plan provisions. Thus,

this Court may wish to address the issue of regulating fiduciary behavior on discretionary matters by establishing principles of law applicable to this standard of review.

Plan administration disputes characteristically arise when, as here, a fiduciary denies benefits to a participant or a beneficiary. *"De novo"* review now applies to all ERISA disputes regardless of whether the plan is funded or unfunded and regardless of whether the administrator or fiduciary is operating under a possible or actual conflict of interest. The "arbitrary or capricious" standard applies where a plan gives discretion to an administrator or fiduciary to determine eligibility or to construe the terms of a plan and a conflict of interest is considered as a factor. *Firestone Tire and Rubber Company v. Brūch*, ___ U.S. ___, 109 S. Ct. 948, 956 (1989).

The "arbitrary or capricious" standard of review is generally stated as follows:

> The fiduciary's determinations in exercising discretionary powers will be sustained unless it is found to be arbitrary or capricious, in bad faith, unsupported by substantial evidence or erroneous as a question of law. *Short v. Central States*, 729 F.2d 567 (8th Cir. 1984)

Id. at 571.

Other courts are not even this descriptive in expressing the standard of review of their circuits. For example, the 9th Circuit places the burden on the trustees to show a certain plan provision excluding certain participants was not "arbitrary and capricious". *Harm v. Bay Area Pipe Trades Pension Plan Trust Fund*, 701 F.2d 1301, 1305 (9th Cir. 1983). The 2nd Circuit has a less rigorous version

requesting the consideration of several factors to determine if the decision was "arbitrary and capricious". *Valle v. Joint Plumbing Industry Board*, 623 F.2d 196, 203 (2nd Cir. 1980). The 10th Circuit is even less imaginative much like the ruling by the Courts below in the instant case. The 10th Circuit requires only that a challenged provision (i.e., decision) be "rational" to support the fact it was not arbitrary or capricious". *Mestas v. Huge*, 585 F.2d 450 (10th Cir. 1978). The 11th Circuit holds that the Court must support the trustees decision even though the Court disagrees with the decision based on the evidence. *Sharron v. Amalgamated Insurance Agency Services, Inc.*, 704 F.2d 562, 564 (11th Cir. 1983). This was also the conclusion in the 3rd Circuit prior to *Firestone*, supra. See *Gaines v. Amalgamated Insurance Fund*, 753 F.2d 288, 289 (3rd Cir. 1985). And some courts apply a more sophisticated application such as the 5th Circuit where the Court considers consistency, "fairness", reasonableness and consideration of "unanticipated costs" as well as bad faith of the trustees. *Dennard v. Richards Group, Inc.*, 681 F.2d 306 (5th Cir. 1982). In the 6th Circuit, the Court has said that any review is limited to the question of whether the trustees action in administering and interpreting the plan is merely "arbitrary and capricious" (note the "and" rather than "or"). *Moore v. Reynolds Metals Company Retirement Program for Salaried Employees*, 740 F.2d 454, 457 (1984), *cert. denied*, 469 U.S. 1109 (1985). In a subsequent case, the Court put aside an argument the standard should be more restricted to overcome the heavy burden on the Plaintiff where the employer was also a trustee and, instead, applied the "arbitrary and capricious" standard stating that it would apply a stricter standard if the Court

could start with a "clean slate". *Varhola v. Doe*, 820 F.2d 809, 813 (1987). Yet the Court did not define the standard in any particular manner nor has the 6th Circuit done so in other cases including *Davis*, supra, where the court simply held that under the "arbitrary and capricious" standard there was no "strong" basis for overturning the Committee's decision. *Davis*, 887 F.2d at 694. Unfortunately without guidelines such general, if not vague, principles cause the Circuit Courts to differ substantially in applying the standard thus resulting in inconsistent decisions.

A recent law review article focused on the problem and even suggested a viable solution. See: "Judicial Review of Fiduciary Claim Denials Under ERISA: An Alternative to the Arbitrary and Capricious Test", 71 *Cornell L. Rev.* 986 (1986). In the *Cornell* article, the author traces the evolving theories of employee benefit plans from the spontaneous gift theory to the contemporary theory of deferred compensation where the employee enjoys a "right" to the benefits at some future date depending on the circumstances then existing. This is especially true in plans resulting from collective bargaining. *Inland Steel Co. v. NLRB*, 170 F.2d 247, 253 (7th Cir. 1948). Many plans (including the plan at KFC) have stringent eligibility requirements which conflict with the concept of deferred compensation justified on the theory of the actuarial health of the plan. But the deference test now applied by the Courts has no relationship to the actuarial health of the plan. Rather, the test provides an almost unrestricted opportunity for abuse by fiduciaries with obvious conflicts of interest and often, as here, even more serious

violations of ERISA including the lack of loyalty, impartiality and neutrality to the plan and its participants and beneficiaries. The Courts, too, are thereby limited in protecting participants and beneficiaries as well as preventing abuses by employers and others. The *Cornell* author proposes the challenged fiduciary should bear the burden of demonstrating the actuarial necessity for the interpretation of the plan to deny the deferred compensation to a claimant. This is something already occurring in some courts under certain circumstances. See *Fine v. Semet*, 699 F.2d 1091 (11th Cir. 1983). The Court justified the decision in *Fine* on general deference principles to uphold the trustee's decision not to make a lump sum payment.

Accordingly, this Court may now wish to establish standards for the conduct of fiduciaries in the administration of plans where the Trustees exercise discretion when determining plan benefits based on interpretation of the provisions of the plan especially where there is more than a mere conflict of interest.

II

More directly on point for purposes of this petition, this Court in *Firestone, supra*, or by earlier cases, did not address the concern for loyalty, neutrality and impartiality of trustees required by ERISA and general trust law. *G. Bogert & G. Bogert*, LAW OF TRUSTS AND TRUSTEES § 543, pp. 197-221 (Rev. 2d Ed. 1980); RESTATEMENT (SECOND) OF TRUSTS § 170 (1959). Thus the principle applicable to a standard of review where, as here, the motivations of plan administrators and fiduciaries are clearly in issue remain for the Court to establish

by another decision. Such principles will surely require no less than a *"de novo"* judicial review rather than a deference review where such allegations are simply weighed as a "factor" to determine if there is an abuse of discretion. Obviously the deference standard is easily applied if one is assured of the neutrality and impartiality and loyalty of the Trustees. If, as here, these are not assured, then this Court may wish to consider the adoption of the rationale expressed by the Court in *Bruch v. Firestone Tire and Rubber Co.*, 828 F.2d 134 (3rd Cir. 1987) at 143-146. There the Court suggested this standard:

> "The principles of trust law instruct that when a trustee is thought to have acted in his own interest and contrary to the interest of the beneficiaries, his decisions are to be scrutinized with the greatest possible care. 'Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty' which governs a trustee in the execution of his fiduciary duty. *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928)"

After all, a fiduciary bears an unwavering duty of loyalty to the beneficiaries of the trust to the total exclusion of the interests of all other parties. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981). Otherwise he should not serve as a trustee.

The facts of this case clearly show that these fiduciaries were not neutral or impartial let alone loyal. Here they knew KFC was a defendant in a law suit where KFC could be liable for a $1,000,000 judgment if Davis was found to be an employee at the time of his death but not liable if he was not an employee. The three (3) controlling

Board members/trustees of the plan were also Directors of other related companies and, more importantly, they were also trustees of one of Kentucky's largest trust funds wherein they controlled 83% of Kentucky Central Life Insurance Company, Inc., one of Kentucky's largest corporations which owned through a subsidiary corporation 100% of the stock of KFC. Thus, they were also cognizant that a $300,000 death benefit to Davis' daughter from the KFC plan would adversely effect the annual actuarial contribution of the company thereby adversely effecting its profit as would, of course, a $1,000,000 judgment.

Three of the Board members and Trustees of the Plan were senior partners of a large law firm who were not only legal counsel to the Respondents herein including the Plan but also many other related businesses. One of them (Schaeffer) executed the Affidavit forming the sole documentation supporting the termination theory which the lower courts sustained based on the "arbitrary and capricious" standard. App. 32 to 35.

They also knew Davis had been drawing his regular pay and would do so for six months when he would attain age 59½ and gain certain tax advantages. They knew Davis continued to participate as an employee in the free KFC health and life insurance plans, the thrift plan and the stock purchase plan. One of them even testified in Davis' divorce proceeding that Davis was on a six month terminable leave of absence until August 8, 1982 App. 30. And, of course, they knew on February 8, 1982 that Davis would never return to work for the company and that he would begin a law practice, something one does who is on a terminable leave of absence.

Finally these fiduciaries even refused to accept the fact Davis was an employee when a 12 person jury found Davis was, in fact, an employee. The jury reached this decision after hearing testimony of four (4) of the Board members and Trustees of the plan who sought to support the insurance company's defense that Davis was not an employee when he died. The jury didn't believe any of them yet the "arbitrary and capricious" standard now denies a dependent child of a participant his deferred compensation in the form of death benefits.

III.

The lower Courts should have recognized and applied as determinative the finding of the jury that Davis was an employee of KFC at the time of his death whether by the equitable principles of ERISA or by collateral estoppel as argued below.

The District Court and the 6th Circuit treatment of the Petitioner's collateral estoppel claim was misapprehended. In effect, the lower courts said that reasonable minds can draw contrary legal conclusions from the same body of evidence – that substantial evidence can reasonably support opposite conclusions. No one who subscribes to the American jury system can doubt this statement. However, the point is that this conclusion rather than aiding in the understanding of the doctrine of collateral estoppel, enunciates the opposite of that doctrine. If the doctrine applies, it simply means that the parties have had their day in court as to the issue in question (here, employment status) and reasonable minds

(i.e., the jury and judge as factfinder) will not be given a chance to reach a contrary conclusion in a later action.

The lower Courts in the instant case then proceed to deny the application of the doctrine by pointing out in conclusory fashion that there is neither an identify of the issues nor an identity of the parties in the present case. The Courts insists that the state court treatment of Mr. Davis's status as an "employee" arose in the context of a life insurance policy, while the treatment by the fiduciaries on the employee question in the present case arose in the context of a retirement plan, (apple/oranges theory of the District Court) so the Courts concluded there can be no finding of an identity of issues. This conclusion is simply and clearly erroneous. As stated in 1B J. Moore, J. Lucas, & T. Currier, *Moore's Federal Practice* ¶ 0.443[2] at 760 (1988):

> [t]he Sixth Circuit said . . . that an "issue" is a "single, certain and material point arising out of the allegations and contentions of the parties."

(Citing and quoting *Paine & Williams Co. v. Baldwin Rubber Co.*, 113 F.2d 840, 843 (6th Cir. 1940).) The single, certain and material point here is clearly the employment status of Kenneth Davis with Kentucky Finance Companies at the time of his death. For the Kentucky Courts to resolve the *secondary* issue of whether the life insurance policy covered an employee on a leave of absence, the jury as fact finder had to *first* determine if Davis was, in fact, an employee which it did so find. Then the Kentucky Courts determined if there was coverage under terms of the policy and found there was coverage and this was affirmed on appeal. App. 21. And the fact that this issue

has arisen in two different proceedings does not alter the identity of the question in the two proceedings.

The lower Court's objection based on a lack of identity of the parties is met by the very case cited by the 6th Circuit. *Montana v. United States*, 440 U.S. 147 (1979). In that case, the question of the identity of the parties involved the United States as a party. The initial action was brought to challenge a state gross receipts tax in state court by a contractor in a federal dam project. The United States made the same challenge in a later suit that it initiated in federal court. The United States was held to be collaterally estopped from relitigating the issue of the validity of the tax in view of the state court's upholding of the tax. Since the United States financed and was otherwise involved in the state court litigation, the federal court found that its technical lack of status as a party in that action did not prevent the application of collateral estoppel:

> Thus, although not a party, the United States plainly had a sufficient "laboring oar" in the conduct of the state court litigation to actuate principles of estoppel.

Id. at 155. KFC's involvement in the state court action, *Woodson v. Manhattan Life Insurance Co. of New York*, 743 S.W.2d 835 (Ky. 1987), was at least as extensive as the involvement of the United States in the state court action in the *Montana* situation especially since it was a wholly owned subsidiary of Kentucky Central Life Insurance Company who was a Defendant throughout the trial because of Davis' free $25,000 life policy as an employee, and it lost and paid its insurance proceeds *without* appeal. And, of course, the Respondent's primary witnesses were

all Board members of KFC and Trustees of the Plan testifying Davis was not an employee. The jury didn't believe them!

IV

The District Court in its Memorandum Opinion and Order of August 4, 1987 denied (1) the Appellant's motion to join as Defendants individual members of the Kentucky Finance Companies Retirement Plan Retirement Committee who were members of the Committee during the 1982 calendar year and (2) the Appellant's motion for partial summary judgment in relation to ¶¶ (4), (5), (7) and (8) in Appellant's prayer for relief. The relief sought was for extracontractual and punitive damages. The court below denied both of these motions on the basis of the majority opinion in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985). This decision sought to resolve a conflict among the circuits as to the ability of a participant or beneficiary to personally recover from a fiduciary extracontractual compensatory and punitive damages. The Court held that recovery under § 409(a) of ERISA (29 *U.S.C.* § 1109(a)), which provides for the personal liability of a fiduciary who breaches his obligations, permits only the plan, and not beneficiaries, to recover such extracontractual and punitive damages. In a separate, concurring opinion by Mr. Justice Brennan, joined by three other Justices, it was asserted that the Court's decision was limited to the right of individual beneficiaries to recover extracontractual compensatory and punitive damages under § 409(a) and did not preclude an individual's recovery of such damages under § 502(a)(3) of

ERISA (29 *U.S.C.* § 1132(a)(3)), which allows an individual beneficiary to obtain "other appropriate equitable relief." As Mr. Justice Brennan stated:

> This [decision] does not resolve, of course, whether and to what extent extracontractual damages are available under § 502(a)(3). This question was not addressed by the courts below and was not briefed by the parties and amici. Thus the Court properly emphasized that "we have no occasion to consider whether any other provision of ERISA authorizes recovery of extracontractual damages." Ante, at 139, n 5, 87 L Ed 2d, at 101. Accordingly, we save for another day the questions (1) to what extent a fiduciary's mishandling of a claim might constitute an actionable breach of the fiduciary duties set forth in § 404(a), and (2) the nature and extent of the "appropriate equitable relief . . . to redress" such violations under § 502(a)(3).

Id. at 150.

Unfortunately, cases decided since *Massachusetts Mutual* have not been sensitive to the position of the four concurring Justices. In *Sommers Drug Stores v. Corrigan Enterprises, Inc.*, 793 F.2d 1456 (5th Cir. 1986), the court held that punitive damages may *not* be recovered by an employee against the employer and a shareholder and director as fiduciaries under § 409(a) or § 502(a)(3), and *Dime Coal Co. v. Combs*, 796 F.2d 394 (11th Cir. 1986), where the Court said the six civil enforcement provisions of § 502(a) "provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." 796 F.2d at 398 (citing *Massachusetts Mutual Life Insurance Co. v. Russell, supra*). The 6th Circuit, in *Varhola v. Doe*, 820 F.2d 809 (6th Cir.

1987), while recognizing that the Court in *Massachusetts* reserved decision as to the recovery of extracontractual damages through § 502(a)(3), voiced the opinion that, on the basis of *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, (1987), this Court will rule that the damages in question are not recoverable through § 502(a)(3).

The Petitioner would point out to the Court that the acts of the fiduciaries in this case may be such an egregious breach of fiduciary duty under 29 *U.S.C.* § 1104 that the demand for extracontractual compensatory and punitive damages is justified under § 502(a)(3), as preserved by at least the concurring Justices in *Massachusetts, supra*. It was therefore error for the courts below to simply deny outright the Appellant's potential rights to extracontractual and punitive damages under § 502(a)(3) of ERISA.

CONCLUSION

This Court may never receive a more appropriate petition to grant for the purpose of establishing those principles of law applicable to both the "arbitrary and capricious" standard and the standard of review where ERISA fiduciaries are alleged to have not merely a simple conflict because of management status but where, as here, the trustees have breached their fiduciary duties because they lack neutrality, impartiality and loyalty.

Furthermore, the facts of this case present the Court with an opportunity to resolve the questions left unresolved by *Massachusetts Mutual*, 473 U.S. 134 (1985)

Respectfully submitted,

William R. Meredith
Attorney for the Petitioner
109 Short Street
Harrodsburg, KY 40330
(606) 734-5119

No. 88-6067

UNITED STATES OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER
(Filed Dec. 4, 1989)

MISTY DAWN DAVIS, and infant under eighteen (18) years of age, by and through her Guardian FARMERS BANK & CAPITAL TRUST COMPANY, of Frankfort, Kentucky

Plaintiff – Appellant

v.

KENTUCKY FINANCE COMPANIES RETIREMENT PLAN; KENTUCKY FINANCE COMPANIES RETIREMENT PLAN RETIREMENT COMMITTEE; KENTUCKY FINANCE COMPANY, INC., CENTRAL BANK & TRUST COMPANY;

Defendants – Appellees

ELLA MAE DAVIS

Defendant

BEFORE: BOGGS, Circuit Judge; ENGEL, Senior Circuit Judge; GIBSON, District Judge.*

Upon consideration of the petition for rehearing filed by the appellant, the court concludes that the issues raised therein were fully considered upon the original oral argument and decision of this case.

---

*The Honorable Benjamin F. Gibson, District Judge for the Western District of Michigan, sitting by designation.

It is therefore ORDERED that the petition for rehearing be and it hereby is DENIED.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

No. 88-6067

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MISTY DAWN DAVIS, an infant under eighteen years of age, and through the Guardian, Farmers Bank & Capital Trust Co. of Frankfort, Kentucky, *Plaintiff-Appellant,*	ON APPEAL from the United States District Court for the Eastern District of Kentucky
v.	
KENTUCKY FINANCE COS. RETIREMENT PLAN; KENTUCKY FINANCE COS. RETIREMENT PLAN RETIREMENT COMMITTEE; KENTUCKY FINANCE CO., INC.; and CENTRAL BANK & TRUST CO., *Defendants-Appellees.*	

Decided and Filed October 12, 1989

Before: BOGGS, Circuit Judge; ENGEL, Senior Circuit Judge* and GIBSON, District Judge.**

---

*The Honorable Albert J. Engel became Senior Circuit Judge on October 1, 1989.

**The Honorable Benjamin F. Gibson, United States District Judge for the Western District of Michigan, sitting by designation.

BOGGS, Circuit Judge, Misty Dawn Davis (Davis) appeals from the district court's summary judgment denying her death benefits as her father's beneficiary. Her father, Kenneth Davis, a former employee of Kentucky Finance Company, Inc. (KFC), was murdered by his wife. The dispute concerns whether the decedent still was employed by KFC at the time of his death. The district court denied Davis's claim for death benefits, finding that the Retirement Committee (the Committee) which administers the KFC Retirement Plan was correct in deciding that Kenneth Davis was no longer an employee at the time of his death for purposes of the plan. The court also held that determination of this issue was not collaterally estopped on the basis of a decision by the Kentucky Supreme Court finding that the decedent still was a KFC employee at the time of his death for purposes of his life insurance policy. *Woodson v. Manhattan Life Insurance Co.*, 743 S.W.2d 835 (Ky. 1987). Finally, the court denied Davis's motion to join individual members of the Committee as defendants. We affirm.

I

Kenneth C. Davis (decedent) was an employee of KFC from 1960 to at least 1982. He resigned as an officer and director on February 8, 1982, as a result of a meeting with KFC's executive board; however, Davis claims that he did not resigned as an employee of KFC at that time. Davis claims that the decedent was to be carried as an employee under a leave of absence for six additional months, at which time he would leave KFC's employ and take distribution of his retirement benefits. However, he was murdered by his wife before his retirement benefits

commenced. Under Art. V, § 5.03 of the Plan, a death benefit is available to the participant's surviving spouse or dependent child, but only if the participant's employment had not been terminated at the time of his death. Section 5.01 provides that no death benefit is available if the terminated participant should die prior to the commencement of benefits and prior to filing a claim for benefits.

Plaintiff Davis, as beneficiary of decedent's death benefits, requested benefits under the Plan from KFC's Retirement Committee. The Committee denied such benefits. KFC contended that the decedent had been terminated and was therefore not an employee at the time of his death. Under that view, his death benefits had been forfeited.

Davis brought suit in district court to recover the death benefits. That court issued three memorandum opinions. On August 4, 1987, the court denied Davis's motion to join individual members of the Committee in order to seek their personal liability for extracontractual compensatory and punitive damages. On June 21, 1988, the court granted summary judgment to the defendants, denying Davis's claim for death benefits. Finally, on August 18, 1988, the court filed its order denying Davis's claim of collateral estoppel.

Misty Dawn Davis is the daughter and dependent of the decedent. The decedent was hired by KFC on March 17, 1960, and became a member of its retirement plan (the plan). As of December 31, 1981, the decedent was Senior Vice President, Legal Counsel, Director and Member of the KFC Retirement Committee. Decedent was in-house

counsel for the plan, and so well-acquainted with its provisions.

The plan was adopted originally in 1959 and was amended several times thereafter to conform with changes in the Employee Retirement Income Security Act (ERISA) enacted by Congress. The plan has specific benefit provisions for a member-employee who is terminated for a reason other than death or retirement. A member credited with five or more years' service shall be entitled to receive monthly retirement income beginning at his normal retirement date. A member who terminates employment with 15 years or more of credited service is entitled at any time after reaching age 55 to elect the immediate commencement of benefits, in compliance with the minimum vesting standards of 29 U.S.C. § 1053. The final sentence of section 5.01 of the plan provides: "Notwithstanding anything expressed or implied to the contrary, in the event a terminated Member dies prior to the beginning of the period for which benefits will be payable, no Death Benefit shall be payable under this Plan."

Death Benefits are provided for in Art. V, § 5.03 of the plan. Consistent with the above-quoted language, such benefit is available to the decedent's surviving wife or dependent child only if the decedent had not been terminated from employment. Under Art. II, § 2.35(a)(ii), an employee receives credit for service for any time attributable to a "leave of absence" granted by the employer, up to two years.

On February 8, 1982, KFC's executive board met to discuss the decedent's future with the company. KFC

claims that the decedent resigned his position at that meeting and immediately opened a private law practice in Lexington, Kentucky. The details of the February 8 meeting "are not presently available;" however, Davis claims that the result was that the decedent agreed to resign as an officer and director of KFC, and the executive board agreed to carry the decedent, or caused him to believe that it so agreed, as an employee-member for six additional months. This would have allowed the decedent to attain the age of 59½ before electing, as a 100% vested member, the commencement of his retirement benefits under § 5.01, which also would have allowed the decedent to gain certain income tax advantages. KFC claims that it merely agreed to pay the decedent six months' severance pay. The decedent made no election upon the resolution of his status at the February 1982 meeting.

In an action in Kentucky state court, in which the decedent's estate sought to recover on a life insurance policy, the Fayette Circuit Court jury specifically found that the decedent was on a leave of absence granted by the executive board at the time of his death. The Kentucky Court of Appeals reversed, holding that the "leave of absence" contemplated by the policy is one in which the policy holder, the employer, and the employee intend for the absence to be temporary and that the employee will eventually return to work. However, the Kentucky Supreme Court reversed the court of appeals, finding that there was no such restrictive language in the policy and affirming the jury's verdict that the decedent was an employee of KFC on leave of absence at the time of his death. 743 S.W.2d 835 (Ky. 1987).

The district court's first order resolving a number of pre-trial motions is dated August 4, 1987. There, the court ruled to compel answers to an interrogatory, and denied the motion to join the individual members of the Retirement Plan Committee under Rule 19, Fed. R. Civ. P. The judge reasoned that the members of the Committee could be held personally liable for a breach of fiduciary duties to the plan but not to beneficiaries of the plan, citing 29 U.S.C. § 1109 and *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985). The court further granted summary judgment to the defendants regarding four counts of the complaint that were meritless under § 1109 and *Massachusetts Mutual*. The court also denied additional requests for discovery, finding that there was not sufficient justification for delaying the proceedings. Finally, the court ruled that Davis could not amend her complaint to add claims not cognizable under ERISA. Davis argues on appeal that the judge should have allowed her to add a claim of equitable estoppel, which he held could not be raised under ERISA.

In its second opinion in this case, the trial judge granted summary judgment to the defendants, finding that the decedent was no longer an employee of KFC at the time of his death, and that because he had not elected to begin receiving benefits before his death, his beneficiary was not entitled to receive benefits. The court reasoned that the decedent could have elected to receive early retirement benefits any time after his resignation, and that his failure to do so demonstrated his intent to wait and receive full benefits at normal retirement age. Section 5.01 of the plan states that if a terminated employee dies prior to the beginning of payment of benefits,

then no death benefit is payable. The court found that, in light of the plan's language and the "arbitrary and capricious" standard of review, there was no basis for reversing the Committee's interpretation of the plan as it applied to the decedent. Thus, the trial judge entered a final judgment granting summary judgment to the defendants.

Davis then moved to alter or amend the judgment under Rule 59(e), Fed. R. Civ. P., arguing that the court was collaterally estopped from finding that the decedent was not a KFC employee at the time of his death by the Kentucky Supreme Court's decision in *Woodson*, 743 S.W.2d 835. The Kentucky Supreme Court had upheld a jury finding that the decedent was on a leave of absence from his job at KFC at the time of his death. However, the district court reasoned that *Woodson* was not controlling because it was based solely on the particular terms of the decedent's life insurance policy. The court stated that decedent's status as an employee for the purposes of a particular insurance contract did not require that he be considered an employee for all purposes. The court concluded that it was bound to uphold the Committee's decision unless it was found to be arbitrary and capricious, which it was not. Thus, the court denied the motion to alter or amend its earlier judgment.

II

On Appeal, Davis argues that the district court was in error in applying the "arbitrary and capricious" standard of review because the question of whether the decedent was an employee at the time of his death is a

question of law. Further, Davis argues that, even if the court applied the correct standard, there was no evidentiary basis for the court's conclusion. In addition, Davis claims that the district court was in error when it failed to apply the doctrine of collateral estoppel to this case, and when it denied her motion to amend her complaint to add a claim of equitable estoppel. Finally, Davis avers that the district court should have allowed her to seek equitable relief in the form of extracontractual compensatory and punitive damages. KFC argues that the district court applied the correct standard, and that the Committee's decision denying Davis benefits was not arbitrary or capricious. It also claims that the court was correct regarding the applicability of collateral estoppel, equitable estoppel, and equitable relief in the form of extracontractual compensatory or punitive damages.

The district court reviewed the Committee's denial of benefits under the arbitrary and capricious standard of review. Until the Supreme Court's recent decision in *Firestone Tire and Rubber Co. v. Bruch*, ___ U.S. ___, 109 S. Ct. 948 (1989), the law was well-settled that "the arbitrary and capricious standard applies to decisions by plan administrators under ERISA to deny benefits to particular claimants." *Varhola v. Doe*, 820 F.2d 809, 813 (6th Cir. 1987); *Roberson v. General Motors Corp., Detroit Diesel Allison Division*, 801 F.2d 176, 179 (6th Cir. 1986); *Cook v. Pension Plan for Salaried Employees of Cyclops Corp.*, 801 F.2d 865, 871 (6th Cir. 1986); *Fielding v. International Harvester Co.*, 815 F.2d 1254, 1257 (9th Cir. 1987)(citation omitted); *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140, 1148 (4th Cir. 1985)(citations omitted); *Pokratz v. Jones Dairy Farm*, 771 F.2d 206, 209 (7th Cir. 1985). "The

arbitrary or capricious standard is the least demanding form of judicial review of administrative action." *Pokratz*, 771 F.2d at 209. "When it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome, that outcome is not arbitrary or capricious." *Ibid.*

In *Cook*, 801 F.2d at 871, the issue was whether terminations due to plant closure were "discharges" within the meaning of the applicable retirement plan. In other words, just as in this case, this court was faced with determining the validity of the plan administrator's interpretation of a term used in the plan. There, this court stated that "[t]he case law is uniform, however, in holding that, under such circumstances, the deference to be accorded the [administrator] in the administration of its plan requires the court to stay its hand in the interest of efficient pension administration." *Ibid.*

However, in *Firestone*, the Supreme Court announced a departure from this rule when the plan administrator is also the employer, in cases involving challenges to denials of benefits based on plan interpretations. ___ U.S. at ___, 109 S. Ct. at 953. The Court held that a *de novo* standard of review should apply *unless* "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Id.* at ___, 109 S. Ct. at 956. In this latter circumstance, the Court held, "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'factor[ ] in determining whether there is an abuse of discretion.' " *Ibid.* (quoting Restatement (Second) of Trusts § 187, Comment d (1959)).

In the instant case, section 6.08 of the plan states that

> [i]n case of any factual dispute hereunder, the Retirement Committee shall resolve such dispute giving due weight to all evidence available to it. The Retirement Committee shall interpret the Plan and shall determine all questions arising in the administration, interpretation and application of the Plan. All such determinations shall be final, conclusive and binding except to the extent that they are appealed under the . . . claim procedure.

This section makes clear that the plan administrator is given great discretion to interpret the language of the plan. Thus, the district court was correct in applying the arbitrary and capricious standard to the Committee's interpretation and application of the term "employee" in the KFC plan. *Ibid.* The fact that the Retirement Committee that administers the plan is composed of management-level employees of KFC is significant only to the extent that any possible conflict of interest should be taken into account as a factor in determining whether the Committee's decision was arbitrary and capricious. *Ibid.*

In addition, this court is now reviewing the district court's granting of a summary judgment. In reviewing the grant of a summary judgment, such judgment will be affirmed if the reviewing court finds that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Thus, this court must determine whether there is any genuine issue of material fact as to whether the Committee's decision denying benefits on

the grounds that the decedent was no longer a KFC employee was arbitrary or capricious.

III

The Committee based its denial of death benefits on its conclusion that the decedent was no longer a KFC employee for purposes of the plan when Davis filed her claim for benefits. The Committee found that: (1) the decedent had resigned his position with KFC effective February 8, 1982 and had started a private law practice in Lexington, Kentucky; (2) KFC agreed to pay the decedent six months severance pay; (3) Mr. Davis had no intention of returning to work for KFC, and KFC had no intention of rehiring the decedent; (4) the decedent had completed at least fifteen years of service with KFC and was over the age of 55 at the time of his resignation and so could have elected to receive early retirement benefits; (5) at the time of his death, the decedent had made no such election under the plan; and (6) section 5.01 of the plan expressly states that if a terminated employee dies prior to the beginning of payment of benefits, then no death benefit is payable. The Committee thus determined that the decedent did not qualify for death benefits under § 5.01 of the plan. Davis claims that the decedent was taking a leave of absence from KFC and thus was still employed. Further, she claims that he was receiving a salary, and not severance pay, during the six months after his departure from KFC.

Under the arbitrary and capricious standard and under the standard of review of summary judgments, there

is no strong basis for overturning the Committee's determination. As in *Cook*, 801 F.2d at 870, there is some ambiguity in the plan's language. In *Cook*, the issue was what types of terminations amounted to "discharges" under the language of the plan. *Ibid*. Here, the issue is what constitutes an "employee."

The Committee indicated that an important step in its reasoning was its finding that the decedent did not plan to return to work, and KFC had no intention of rehiring him. In fact, the decedent had begun to pursue other avenues of work before his death. As in *Firestone*, ___ U.S. at ___, 109 S.Ct. at 956, and *Cook*, 801 F.2d at 871, a court reviewing the interpretation of the plan made by its administrators must defer to the administrator's construction when the plan itself commits such interpretation to the discretion of the administrator. Here, there is no inconsistency in the Committee's interpretation of the plan; Davis does not claim that the Committee's reading renders the plan somehow internally inconsistent. Nor does Davis claim that the Committee acted in bad faith. Without a showing of internal inconsistency or bad faith or some other ground for calling the Committee's determination into question, the arbitrary and capricious standard demands affirmance.

Davis's only argument apart from her challenge to the use of the arbitrary and capricious standard, put to rest by *Firestone* and the plan's clear language, is that the district court did not have enough evidence of the Committee's reasoning to assess its validity. The district court did have numerous affidavits from members of the Committee, as well as other documentation in which the Committee's rationale was explained. In addition, Davis does

not argue that the district court's summary of the Committee's reasoning is flawed. Thus, she cannot prevail on this issue. The district court's decision affirming the Committee's interpretation of the plan, and consequent denial of death benefits, is affirmed.

IV

Davis next argues that the district court was collaterally estopped from ruling as it did in light of the Kentucky Supreme Court's decision in *Woodson*, 743 S.W.2d 835. However, even though one decisionmaker's conclusion is upheld because it was based on substantial evidence, as the Kentucky Supreme Court found the jury's finding in *Woodson* was, a contrary decision by a different decisionmaker may also be upheld because the record contains substantial evidence to the contrary. The same is true even though our standard of review of the Committee's decision is the arbitrary and capricious standard – a finding of substantial evidence for one conclusion does not negate the possibility that an opposite conclusion is not arbitrary or capricious.

Further, the *Woodson* court was construing the terms of a life insurance policy, not the terms of the plan. Thus, there is no identity of issues in the two cases. *Montana v. United States*, 440 U.S. 147, 155 (1979). In addition, KFC was dismissed as a party in *Woodson* before a decision on the merits was made, except to the extent that the insurance company later unsuccessfully sought indemnification from KFC for the amount awarded to Davis. 743 S.W.2d 835. Collateral estoppel requires identity of parties, *George v. United Kentucky Bank, Inc.*, 753 F.2d 50, 53

(6th Cir.), *cert. denied*, 471 U.S. 1018 (1985), and also requires that the party against whom the earlier decision is asserted had a "full and fair opportunity" to litigate its claim. *Allen v. McCurry*, 449 U.S. 90, 95 (1980). Here, there was no identity of parties, not did the Committee have an opportunity to litigate the merits of these issues in *Woodson*.

Thus, Davis's arguments regarding collateral estoppel must fail. We affirm the decision of the district court.

V

Finally, Davis claims that she should have been allowed to amend her complaint to add a claim of equitable estoppel, and that she should have been allowed to litigate her claims for extracontractual compensatory and punitive damages. She claims that the plan's ambiguity regarding this issue amounts to a misrepresentation; that the plan members breached their fiduciary duty so egregiously that they are not entitled to the protections afforded by their status; and that the plain unfairness of the situation demands equity.

As regards any claims against the individual members of the Committee, the district court was correct when it stated that any such argument must fail under *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985). There, the Supreme Court stated that, although 29 U.S.C. § 502(a)(2) "authorizes a beneficiary to bring an action against a fiduciary who was violated § 409" of ERISA, *id.* at 140, that duty was intended to protect "the entire plan, rather than . . . the rights of an individual beneficiary." *Id.* at 142. The Court also noted

that "the statutory provision explicitly authorizing a beneficiary to bring an action to enforce his rights under the plan . . . says nothing about extracontractual damages. . . ." *Id.* at 144. Thus, the Court concluded that "the relevant test of ERISA, the structure of the entire statute, and its legislative history all support the conclusion that . . . Congress did not provide, and did not intend the judiciary to imply, a cause of action for extra-contractual [sic] damages . . . " under ERISA. *Id.* at 148. Thus, there can be no extracontractual recovery in the context of an ERISA plan, and the judgment of the trial judge should be affirmed.

A number of courts faced with claims of estoppel in the context of an ERISA plan have given several grounds for rejecting the possibility that such a claim can be brought. In *Baul v. Del Monte Corp.*, 748 F.2d 1348, 1356-57 (9th Cir. 1984), the Ninth Circuit stated that ERISA preempts state common law theories of promissory estoppel, estoppel by conduct, fraud and deceit, and contract actions. The same court stated in a later case that "[a]n employee benefit fund created under a collective bargaining agreement cannot be required on the grounds of equitable estoppel to pay benefits to a person ineligible under the Plan's provision." *Moore v. Provident Life and Accident Insurance Co.*, 786 F.2d 922, 928 (9th Cir. 1986). *Accord O'Grady v. Firestone Tire & Rubber Co.*, 635 F.Supp. 81, 83 (S.D. Ohio 1986).

In the instant case, even if this court were to ask the district court to consider an equitable estoppel claim by Davis, there could be no recovery. The decedent was the

legal counsel in charge of interpreting the plan and counseling the Committee. As such, he was extremely knowledgeable about the contents of the plan and the way in which the Committee was disposed to administer it. It is hard to imagine a harder case in which to prove fraud or misrepresentation; if the attorney charged with advising the Committee on its administration of the plan was fooled by the working of the plan, then the plan cannot withstand any challenge.

Davis claims that KFC somehow defrauded the decedent into failing to elect to receive early retirement benefits under the plan. However, she does not attempt to argue that he did not know that he could make such an election, or that he told anyone of his reasons for not doing so. In other words, this argument is based on pure assertion, with no foundation in fact.

Finally, the Supreme Court has held that causes of action based on state common law are preempted by section 514(a) of ERISA, 29 U.S.C. § 1144(a). *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987). The relevant statute states that ERISA supersedes "any and all state laws insofar as they relate to any employee benefit plan. . . ." 29 U.S.C. § 1144(a). A saving clause preserving laws relating to insurance, banking and securities does not apply here. 29 U.S.C. § 1144(b)(2)(A). Clearly, an equitable estoppel claim would be state law claim. As such, under this most recent Supreme Court pronouncement, such a claim would be preempted.

The same rules would apply to a request for punitive damages. Again, a number of courts have confronted this issue and have decided that neither a profit-sharing trust,

Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc., 793 F.2d 1456, 1463-64 (5th Cir. 1986), nor beneficiaries under a plan, *Varhola v. Doe*, 820 F.2d 809, 817 (6th Cir. 1987), could recover punitive damages. In fact, this court in *Varhola* explicitly relied on the Supreme Court's decision in *Dedeaux*, reasoning that punitive damages are based on state law and thus also are preempted by ERISA.

Because all of Davis's equitable claims are based on state law, they cannot be used to recover ERISA plan benefits or damages relating to the denial of such benefits. The district court's decisions on these matters is affirmed.

VI

Thus, the district court's disposition of all issues on review to this court is correct. There is no basis for finding that the Committee's decision was arbitrary and capricious, and so it must be affirmed. Further, collateral estoppel does not apply here without identity of parties or issues. Finally, in that all equitable claims are based on state law, they are preempted under the relevant Supreme Court decisions. Accordingly, we hereby AFFIRM the decision of the district court.

SUPREME COURT OF KENTUCKY

87-SC-247-DG

MARSHALL B. WOODSON, JR.,
Executor of the Estate of
Kenneth C. Davis, Deceased

MOVANT

ON REVIEW FROM COURT OF APPEALS
V. 85-CA-1170-MR & 85-CA-1501-MR
(FAYETTE CIRCUIT COURT NO. 83-CI-159)

MANHATTAN LIFE INSURANCE
COMPANY OF NEW YORK, N.Y.

RESPONDENT

OPINION OF THE COURT BY JUSTICE LEIBSON

REVERSING

The movant, the Estate of Kenneth C. Davis, claims that he was a covered individual under the terms of a group life insurance policy issued to Kentucky Finance Company by the respondent, Manhattan Life Insurance Company of New York, at the time Davis was killed by his estranged wife on May 19, 1982. The policy coverage for Davis was $500,000, with $1,000,000 for double indemnity.

Prior to February 8, 1982, and for approximately 22 years, Davis had been employed by Kentucky Finance Company, a lending institution with its principal offices in Lexington, Kentucky. After various promotions he achieved the position of General Counsel and Senior Vice-President.

On February 8, 1982, he was called before the Executive Committee of Kentucky Finance Company and told that he must resign. The sole issue in this case is whether

Davis continued to be covered under his group life insurance policy thereafter and at the time he was killed three months later. This in turn depends upon evaluating his employment status following his meeting with the Executive Committee on February 8, 1982, so the content, circumstances and results of that meeting were central to the contested issue. Unfortunately, there were no minutes. Davis has been silenced by death. And the others present were hostile witnesses, officials of Kentucky Finance Company which was a defendant on the same side of the issue as Manhattan Life, only released by a directed verdict.

Davis' Estate claims that when he was killed he was on a six month salary continuation leave of absence, albeit a terminal leave, during which he remained a covered employee. This claim is supported by the contents of a resignation letter of February 26 prepared by the Executive Committee, which Davis signed, in which he resigned from "any and all positions as officer and director," but not from his employment or his other duties as an employee. Further, Robert Curtin, the Secretary/Treasurer for Kentucky Finance, a member of the Executive Committee and the person in charge of the executive payroll, used the term "severance leave" at one point in giving testimony to describe Davis' status. Specifically, Curtin testified that Davis was on a "severance leave" with pay for six months, which would be to August 8.[1] Curtin acknowledged that the company was

[1] Curtin later testified this description as "leave" was a "mistake."

committed to continuing to pay Davis' regular salary during this six months' period as with any other regular salaried employee, including deductions for taxes, savings plans, *and life insurance premiums*, etc.[2] The monthly premium due Manhattan Life was being remitted to and accepted by the Company at the time of Davis death. This monthly salary was then discontinued after Davis' death which is consistent with his status as an employee on leave, but which would be inconsistent if Davis was promised a fixed sum as a severance payment.

The respondent, Manhattan Life Insurance Company, claims that Davis lost his status as a covered individual at this February 8 meeting in which the Executive Committee demanded his resignation; that termination of his employment was complete then and there; and that at the time he was killed on May 19, despite continuation of life insurance premiums paid and received, Davis had no coverage.

Davis' coverage included the option to convert from a group policy to an individual policy, but he and his company were continuing the group policy arrangement rather than undertaking this option. It was obvious that both Davis and the responsible company official thought that Davis was still a covered employee, at least until after he was killed.

Section 6 of the group policy, entitled "Termination of Individual's Insurance" enumerates four events upon

---

[2] We note this six months' salary continuation period coincides with the policy provision (quoted *infra*) covering leave of absence for a period up to six months.

which the insurance "shall automatically cease." The particular event applicable to this case is subsection (d), under which insurance ceases "on the date of termination of employment with the Policyholder." Subsection (d) then states:

> "Termination of employment for purpose of life insurance hereunder, means cessation of active work for the Policyholder as provided in Section I hereof entitled "Definitions", except that
>
> . . . .
>
> (ii) in case of the absence of an Individual from active work because of leave of absence or temporary lay-off, his employment may, for the purposes of his life insurance hereunder, be deemed to continue until terminated by the Policyholder but in no case beyond the expiration of a period of six months following the date such leave of absence or lay-off commenced."

The key language is that there is an exception to "cessation of active work" as fixing the date of termination of employment "*if* the individual is absent from active work because of leave of absence *or* temporary lay-off." (Emphasis added.) The respondent argues vehemently that both "leave of absence" *and* "lay-off" must be only temporary to qualify under this exception, that it does not apply to a terminal leave. But "leave" is *not* qualified by the word "temporary" as is the case with "lay-off." The policy language makes no distinction in the type of leave, nor does it exclude terminal leave.

The trial court submitted the case to the jury under an instruction requiring the jury to decide whether Davis' employment was "terminated on February 8, 1982," or whether he "was then granted a leave of absence as an

employee of Kentucky Finance which was approved by the Executive Committee thereof and was on such leave of absence at the time of his death." The jury decided that the decedent's status was leave of absence, and found for the claimant. Manhattan Life appealed. The Court of Appeals reversed. The Court of Appeals decided that "[t]he clause providing the exceptions to automatic discontinuance of benefits because of leave of absence or temporary lay-off only becomes operative when the 'absence' is for a reason other than permanent termination." There is no such restrictive language so limiting the term "leave of absence" in the policy. Therefore, we reverse the Court of Appeals and affirm the trial court.

This a case where there is sharp disagreement as to the facts, and even more disagreement as to what inferences from the facts are appropriate in deciding Davis' status at the time he was killed. Manhattan Life insists that the evidence is conclusive that Davis was terminated on February 8, pointing to the trial testimony of various Kentucky Finance Company officials to prove this conclusion. But Davis points to the evidence that we have referred to earlier in this Opinion as sufficient to prove his status as an employee who had been placed in a terminal leave status for six months. On appeal from a verdict for the Estate, the only question is, was there substantial evidence to support the verdict? Conflict in the reasonable inferences to be drawn from the testimony, as well as conflicts in the testimony itself, justify submitting the case to the jury. *Murphy v. Homans*, 286 Ky. 191, 150 S.W.2d 14 (1941). *Also, Penn Central Transportation Co. v. Skaggs*, Ky., 489 S.W.2d 26 (1973) and *Ohio Cas. Ins. Co. v. Commonwealth, Dept. of Hwys.*, Ky., 479 S.W.2d 603

(1972). The role of the appellate court when deciding issues of this sort is limited to viewing the evidence from a standpoint favorable to the prevailing party. *Lever Bros. Co. v. Stapleton*, 313 Ky. 837, 233 S.W.2d 1002 (1950).

Manhattan Life points us to Section 1, the "Definitions" section of its policy. This defines "cessation of active work" as meaning "discontinuance of the Individual's performing all of the usual duties of his employment on a permanent full-time basis at the Member's regular place of business." As quoted above, in Section 6 termination of employment occurs upon "cessation of active work for the Policyholder . . . *except that* . . . in case of the absence of an Individual from active work because of leave of absence . . . his employment may, for the purposes of his life insurance hereunder, be *deemed to continue*" for "a period" not to exceed "six months following the date such leave of absence . . . commenced." The emphasized phrases, "except that" and "deemed to continue," establish that there is an exception while on leave and that the employee need not be performing any duties of his employment to retain coverage while in this status.

The principal thrust of the Manhattan Life's complaint that it was entitled to a directed verdict is that the policy must be read in its entirety to determine its meaning. The problem is that, absent language excluding terminal leave from the leave of absence exception, when read as a whole, the meaning of the policy urged by Manhattan Life is no more reasonable than the meaning urged by Davis' Estate.

Movant urges that the facts established Davis' status on terminal leave drawing salary and still covered within

the terms of the policy that relate to "leave of absence," and further argues that if there is any doubt as to whether the policy should be interpreted this way, such doubt should be resolved in favor of the Movant. There are two prongs to this last argument which relates to the proper method for construing an insurance policy. These are:

1) The doctrine of ambiguity; and

2) The doctrine of reasonable expectations.

Turning first to the ambiguity principle, the phrase in the policy which is key to whether the decedent was a covered individual at the time he was killed is the exception to "termination of employment" upon "cessation of active work" "in case of the absence of an Individual from active work because of leave of absence." The Court of Appeals has rewritten the policy to limit leave to temporary leave that anticipates ending with return to active work and to exclude leave that anticipates ending with termination of employment. But the status while on leave is the same regardless of what the future may bring, return to duty or termination.

The Court of Appeals erred in using a restrictive interpretation. Because most insurance policies, including this one, are contracts of adhesion,[3] we recognize the

[3] "Adhesion contract. Standardized contract form offered to consumers . . . on essentially 'take it or leave it' basis without affording consumer realistic opportunity to bargain" over the terms (Black's Law Dictionary, 5th ed., p. 38).

doctrine of ambiguity as applicable. This doctrine holds, as stated in *Wolford v. Wolford*, Ky., 662 S.W.2d 835, 838 (1984):

> "Consequently, the company must be held strictly accountable for the terms of the contract. [Case cited].
>
> If the contract has two constructions, the one most favorable to the insured must be adopted. [Case cited]. If the contract language is ambiguous, it must be liberally construed to resolve any doubts in favor of the insured. [Case cited]."

The unqualified term "leave of absence," if not ambiguous, can only mean that a person is covered on any leave of absence including terminal leave. But assuming that the policy language is ambiguous, it must be interpreted against the insurance company.

The doctrine of reasonable expectations is a corollary to the rule for construing ambiguities. In *Simon v. Continental Insurance Co.*, Ky., 724 S.W.2d 210, 212 (1987), we stated that "[a]n essential tool in deciding whether an insurance policy is ambiguous, and consequently should be interpreted in favor of the insured, is the so-called 'doctrine of reasonable expectations.' " As summarized in R. H. Long's *The Law of Liability Insurance*, § 5.10B:

> "The gist of the doctrine is that the insured is entitled to all the coverage he may reasonably expect to be provided under the policy. Only an unequivocally conspicuous, plain and clear manifestation of the company's intent to exclude coverage will defeat that expectation."

The evidence is that Davis was being paid his monthly salary in the same manner as always, including

deductions, at the time he was killed. Following his death his salary was discontinued. Further, the letter of resignation prepared by the company and signed by Davis states that he resigns from his duties as an "officer and director" of the company but does not otherwise exclude his status as an employee. The responsible company official, Executive Committee Member Robert Curtin, gave testimony supporting a continuing employment relationship:

> ". . . he is on a six month salary continuation which will make it August 6th [corrected to August '8'] as the official termination as an employee."

Manhattan Life insists that this salary was only "severance pay," citing cases to the effect that receiving severance pay does not extend employment. This argument assumes facts which are in dispute. The factual issue was whether this was not just severance pay but severance leave. The nature of the payments as continuation of salary including deductions, stopping with the employee's death, rather than as a fixed sum due and payable regardless of death, supports movant's interpretation. Indeed, this was the interpretation given to his employment status by the company officials responsible for his pay as well as by Davis until *after* his death and this present dispute over payment. He was carried and treated as one on continued employment in a terminal leave status. The evidence to the contrary presented by Manhattan Life from company officials testifying after this dispute arose could do no more than create an issue of fact for the jury, an issue which was resolved by the jury in favor of Davis' Estate. The "reasonable expectations" of *both* Davis and the company up to the time that Davis was killed were

that his status was covered by the policy if death should occur, as it did.

On this appeal the respondent, Manhattan Life, has not questioned the trial court's instructions as fairly stating the issue. There is sufficient evidence in the record to support the jury's finding that the decedent was on leave of absence at the time he was killed. Therefore, the decision of the Court of Appeals is reversed. The judgment of the trial court is affirmed.

Stephens, C.J., Gant, Lambert, Vance and Wintersheimer, JJ., concur. Stephenson, J., dissents by separate opinion.

Manhattan Life Ins. Co. of N.Y., N.Y. v. Woodson, et al, Ky. App., Case No. 85-CA-1170-MR, Opinion, Page 3 (not published) Part of record below.

* * *

he could convert upon his retirement in August, 1982. Other pertinent references to Davis's status with the company in that deposition are as follows:

Q. Has his [Davis's] relationship with the company been terminated as of this date?

A. Yes, it was terminated as of February 6th but he is on a six month salary continuation which will make it August 6th as the official termination as an employee.

. . .

Q. Then the shares that he now has have accumulated since 1975?

A. Yes.

Q. And they have not been withdrawn.

A. No, they have not been withdrawn.

Q. With his termination of employment as of August 6th, will he be permitted to withdraw those at that time?

A. Yes, that is correct.

Q. Prior to that time will he be permitted to withdraw any of them?

A. No, I think it is only on termination of employment.

Q. In addition to the life insurance, was there any health insurance?

A. Yes, we have group insurance with Kentucky Central Life for which the individuals are covered and/or their family, including

> the spouse. That is still in force until the termination date. I think August 8th is the termination date and not August 6th.

Davis was murdered by his wife on May 19, 1982. When Manhattan refused the claim for benefits under the group policy, his executor filed suit against Manhattan on the policy and against Kentucky Finance for willful and negligent

* * *

Exhibit "A"

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
LEXINGTON

MISTY DAWN DAVIS, an infant under eighteen (18) years of age, by and through her Guardian, FARMERS BANK AND CAPITAL TRUST CO.

PLAINTIFF

VS. NO. 83-251

AFFIDAVIT OF EDWIN F. SCHAEFFER, JR.

KENTUCKY FINANCE COMPANIES RETIREMENT PLAN; KENTUCKY FINANCE COMPANIES RETIREMENT PLAN RETIREMENT COMMITTEE; KENTUCKY FINANCE COMPANY, INC.; CENTRAL BANK & TRUST COMPANY; and ELLA MAE DAVIS

DEFENDANTS

* * *

Comes the Affiant, Edwin F. Schaeffer, Jr., having been duly sworn and deposed and states as follows:

1. The Affiant is a member of the Kentucky Finance Companies Retirement Plan Retirement Committee ("Retirement Committee" or "Committee").

2. The Affiant was a member of the Retirement Committee in May, 1982, when Mr. Kenneth Davis was shot and killed, and also in April, 1983 when the Committee denied the Plaintiff's application for death benefits.

3. The Affiant has reviewed the employment records of Kentucky Finance which disclose that Kenneth Davis was initially employed with Kentucky Finance, Inc. on or about March 17, 1960; that as of December 31, 1981, Mr. Davis was Sr. Vice President, Legal Counsel, Director

and a member of the Retirement Committee. Mr. Davis had been a member of the Retirement Committee for several years. He advised the Committee from time to time on interpretive questions concerning the Kentucky Finance Companies Retirement Plan ("Plan"), and was fully acquainted with the Plan terms and provisions.

4. On or about February 8, 1982, Mr. Davis resigned from Kentucky Finance and and started his own private law practice. Kentucky Finance agreed to pay him six (6) months severance pay in connection with his resignation.

5. Mr. Davis was a member of the Plan while he was employed. The Plan was originally adopted in 1959 and was amended periodically to reflect changes in ERISA.

6. Mr. Davis' retirement benefits were 100% vested at the time of his resignation as he had at least 15 years of service and was at least 55 years of age. Since his benefits were vested he would have been eligible to receive retirement benefits upon reaching normal retirement age or he could have elected for early retirement. If he had elected early retirement, he would have started receiving retirement income immediately, although at a reduced rate. As of May 19, 1982, Mrs. Davis had not elected to receive early retirement benefits.

7. On or about March 22, 1983 the Plaintiff herein made a formal claim for benefits under the Plan. In April 1983 the Committee discussed the claim and considered the following information:

a. Kenneth Davis had resigned his position with Kentucky Finance effective February 9, 1982, and had started a private law practice in Lexington, Kentucky.

b. Kentucky Finance had agreed to pay Mr. Davis six (6) months severance pay in connection with his resignation.

c. Mr. Davis had no intention of returning to work for Kentucky Finance, and they had no intention of rehiring Mr. Davis.

d. Mr. Davis had completed at least fifteen (15) years of service with Kentucky Finance and was over 55 years of age at the time of his resignation. Accordingly, he could have elected to receive early retirement benefits although at a reduced rate.

e. At the time of Mr. Davis' death on May 19, 1982 he had not elected to receive early retirement benefits and thus no benefits had been paid.

f. § 5.01 of the Plan expressly states that if a terminated employee dies prior to the beginning of payment of benefits, then "no Death Benefit shall be payable."

8. After reviewing the available information, the Committee determined that Mr. Davis' employment had been terminated as of February 9, 1982, that he was not an employee as of May 19, 1982, that he had not elected to receive early retirement benefits and therefore, pursuant to § 5.01 of the Plan, no Death Benefit was due.

9. After Mr. Davis' death Kentucky Finance received requests for information concerning benefits from three different attorneys. In order to clarify the resulting confusion Mr. Jerry Horn, legal counsel for Kentucky Finance, requested a written statement from the Plaintiff's legal guardian authorizing Mr. Meredith to represent the interest of the child in making her claim. Mr. Horn received the authorization on or about April 4, 1983

and shortly thereafter Mr. Horn met with Mr. Meredith to explain the Committee's decision.

Further the Affiant sayeth naught.

/s/ Edwin F. Schaeffer, Jr.
EDWIN F. SCHAEFFER, JR.

STATE OF KENTUCKY)
)
COUNTY OF FAYETTE)

Subscribed and sworn to before me, a Notary Public, by Edwin F. Schaeffer, Jr., on this the 21st day of July, 1987.

My commission expires: June 21, 1988

/s/ Doris Franklin
NOTARY PUBLIC,
Fayette Co., KY

C:GC/EFS.AFF

Employee Retirement Income Security Act of 1974 (ERISA), Stat. 829, 891, Section 502(a)(3), as amended, 29 U.S.C. Section 1132(a)(3).

CIVIL ENFORCEMENT

SEC. 502. (a) A civil action may be brought–

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, 877, Section 404(a), as amended, 29 U.S.C. Section 1104(a).

FIDUCIARY DUTIES

SEC. 404. (a)(1) Subject to sections 403 (c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and–

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstnaces then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title.

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3)), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 407(d)(4) and (5)).